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IN THE

# Supreme Court of the United States

October Term, 1940.

No. 18.

ROBERT J. DECKERT, ROWLAND W. RANDAL, DAVID W. COMPTON, et al.,

*Petitioners,*

*v.*

THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES.

# BRIEF

OF

## The Pennsylvania Company for Insurances on Lives and Granting Annuities, Respondent.

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THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES.

BRIEF OF THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES, RESPONDENT.

## QUESTIONS PRESENTED.

1. Has a United States District Court any jurisdiction under the Securities Act or the Judicial Code to appoint a receiver for securities held by a bank in trust for individuals, under a Complaint alleging untrue statements and misrepresentations in the sale of the securities to the individuals for whom the bank is trustee:

(a) where the bank has not been guilty of any misconduct, neglect or mismanagement, and has incurred no liability under the Securities Act;

(b) where diversity of citizenship and required amount involved are lacking; and

(c) where the individuals may on demand secure the delivery of their securities, or the liquidating value thereof, from the bank holding them in trust.

2. Should a United States District Court take jurisdiction of a Complaint filed by nine Complainants praying for a receiver of trust assets and the dissolution of trusts;

(a) where there are no facts alleged or proven justifying the removal of the Trustee;

(b) where there are no facts alleged or proven showing waste or dissipation of the trust assets;

(c) where each beneficiary may at any time receive his trust property or the liquidating value thereof upon demand;

(d) where the termination of the trusts would constitute a breach of the terms of the trusts;

(e) where a receivership would hinder the beneficiaries in exercising the rights granted to them under the trust agreements;

(f) where the receivership would result in very large and wholly unnecessary expenses; and

(g) where the principal beneficiaries of the receivership would be the receiver and his counsel.

## STATEMENT OF THE CASE.

The Pennsylvania Company for Insurances on Lives and Granting Annuities (hereinafter called The Pennsylvania Company) is the Respondent in Appeal No. 18. It took a separate appeal to the United States Circuit Court for the Third Circuit which completely reversed the decision of the District Court of the United States for the Eastern District of Pennsylvania in so far as it was concerned.

The Pennsylvania Company is Trustee under two trusts involved in this appeal. These trust agreements

were offered in evidence and were before the Circuit Court as part of exhibit books furnished to each of the three Circuit Judges. (Exhibits 1, 2 and 3.) Since only one of these exhibit books has been lodged with this Court, we have printed these two trust agreements as an appendix to our brief.

## THE CAPITAL TRUST AGREEMENT.

The Trust Agreement dated as of May 1, 1934, between Capital Savings Plan, Inc., (hereinafter called Capital) and The Pennsylvania Company (therein called the Trustee) is the Trust Agreement under which the Contract Certificates held by the nine Complainants were issued. It is printed at length at pages 1 to 45 of the Appendix to our brief.

Under the Contract Certificates and the Trust Agreement the holders of the Contract Certificates agree to make periodic payments to The Pennsylvania Company, Trustee. The usual schedule of payments was \$10.00 a month for ten years or a total of \$1200. From these payments the Trustee is authorized to deduct a trustee fee of 25¢ for each \$10.00 payment or fraction thereof, the proper insurance premium in the case of the Contract Certificates accompanied by insurance, and from the first twelve payments, a fee for Capital of \$60.00 for each \$1200. agreed to be paid. (Appendix p. 5.)

The Trustee is directed by the terms of the Trust Agreement and the Contract Certificates to apply the balance of payments, after deductions have been made, to the purchase of Independence Trust Shares (Appendix p. 5), unless substitution of another medium of investment is made. (Article VI, Appendix pp. 20-22.) There has been no such substitution. The investment is authorized to be made

at the market price, which includes a write-up or load of originally 9%, and at the time of the institution of the proceedings 7½%. The Trust Agreement authorizes the Trustee to apply the dividends and distributions on the trust shares to the purchase of additional trust shares. (Section 3, Appendix p. 6.) Unless the holders of the Contract Certificates become delinquent in their payments for a period of six months (Section 6, Appendix pp. 8-9), their Contract Certificates cannot be terminated by either Capital or the Trustee, so long as trust shares can be purchased. After the Contract Certificateholder has completed all his payments he may withdraw his trust shares or the proceeds thereof, or he may require the Trustee to hold his trust shares for him for a further period of ten years. (Section 4, Appendix pp. 6-8.)

Any Contract Certificateholder, however, may terminate his Contract Certificate at any time and require The Pennsylvania Company, as Trustee, either to deliver him his trust shares or to sell them and remit the proceeds. (Section 5, Appendix p. 8.) Although the purchases of trust shares are made by the Trustee from day to day in bulk, the Trustee keeps accounts showing the amount of trust shares held from time to time for each Contract Certificateholder. (Complaint, Record p. 11.) It is, therefore, at all times in a position to deliver to any Contract Certificateholder the exact number of trust shares (excepting fractional shares) held for his account or the proceeds thereof.

The Trustee may not resign or be removed with respect to its trusts under Contract Certificates already issued. The provisions for resignation and removal (Article V, Appendix pp. 18-20) and termination (Article VIII,

Appendix p. 23) affect only Contract Certificates subsequently issued.

## THE INDEPENDENCE TRUST AGREEMENT.

The medium of investment selected by Capital for its Contract Certificates were the shares of an investment trust of the fixed or deposit unit type, known as Independence Trust Shares, which had been on the market for a number of years. The fact that The Pennsylvania Company also happens to be trustee of this trust and that Capital and Independence Shares Corporation (hereinafter called Independence), the sponsor of the Independence Trust, have merged, has caused considerable confusion in this case. At the time of the original selection the Independence Trust was already a large trust and Capital and Independence were entirely distinct and unrelated companies. For the purposes of the Capital Contract Certificates the medium of investment might just as well have been the shares of an investment trust having another corporate trustee, or the shares of an investment company. There are some 1400 holders of Independence Trust Shares who had no connection with Capital.

The Complaint in its attempt to reach trust assets makes no distinction between trust assets held under the Capital Trust Agreement and trust assets held under the Independence Trust Agreement. The opinion of the District Court also fails to make any such distinction. The allegations of fraud in the Complaint are alleged to have been made only in connection with the Capital Contract Certificates. It is, therefore, important to bear in mind that there are two separate trusts and that there are many beneficiaries of the Independence Trust who have had no

concern with Capital and whose trust assets are in danger of seizure and liquidation.

Independence Trust Shares are issued under an Agreement and Declaration of Trust dated as of April 2, 1930 between Independence and The Pennsylvania Company, as Trustee. This Trust Agreement, together with the supplements thereto, will be found at pages 47 to 103 of the Appendix to our brief. The trust shares are issued in units of 1000 against the deposit with the Trustee of a stock unit consisting of one share each of certain companies. Originally the stock unit consisted of one share each of the 50 companies. (Appendix pp. 72-73.) The Bill of Complaint in these proceedings alleges that there were 42 such companies. The testimony shows that the number of companies had been reduced in February 1939 to 35 pursuant to the power of Independence to eliminate.

One of the important purposes of this investment trust is that the stock units underlying each unit of 1000 trust shares shall at any one time always be identical. The Trustee does not buy the stocks of the underlying companies. They are bought by Independence and deposited with the Trustee against the issuance of the trust shares. In order to maintain this balance all stock dividends, subscription rights, et cetera, are required to be sold. (Section IV, Appendix pp. 51-52.) If the stock of any one of the company is split up or changed to a greater number of shares, the extra shares are required to be sold. (Section VI, Appendix pp. 52-53.) The only instance in which the Trustee is authorized to purchase shares is in cases where one of the companies reduces its outstanding capital or merges with another company. In that event, Independence instructs the Trustee whether the number of shares re-

quired to preserve the balance shall be purchased from funds available for distribution, or whether the shares shall be entirely eliminated. (Section VII, Appendix pp. 53-54.) The only important power which Independence has with respect to the stock unit is its power of elimination, which may be exercised in its discretion if a usual dividend is passed, if any of the companies shall liquidate voluntarily or otherwise, or if at any time Independence receives information which, in its opinion, would warrant the conclusion that the stock of any of the companies may or will become substantially impaired in value. (Section V, Appendix p. 52.)

The Trustee collects the dividends on the deposited stock and transfers these funds into a distribution account. The Trustee also credits the distribution account with the proceeds of sale of all stock dividends, rights, etc., and proceeds of stock of eliminated companies. (Section X, Appendix p. 55.) The funds in the distribution account are distributed semi-annually to holders of trust share certificates, after paying the expenses of the trust. (Sections I and II, Appendix pp. 58-59.)

The trust share certificates are registered in the name of the holder and evidence the interest of the holder in the trust assets. The registered holder may sell them and transfer them to another holder or he may exercise certain rights of withdrawal from the trust. If he holds 1000 trust shares, he has the right to receive from the Trustee a unit of underlying stocks, plus his pro rata share of the distribution account. (Section II, Appendix p. 61.) If he holds less than 1000 trust shares he has the right to receive in cash, a redemption value based upon bid prices of the underlying stocks, plus his pro rata share of the distribu-

tion account. (Sections III, IV, V and VI, Appendix pp. 62-63.)

The Trust Agreement contains no provisions permitting the Trustee to resign. Section XVIII (Appendix p. 67) contemplates that the Trustee might be relieved or discharged by a court of competent jurisdiction and in such case Independence has the right to appoint a successor. The Trust, in accordance with the original Trust Agreement was not to be terminated until October 1, 1950. (Section IV, Appendix p. 59.) A Third Supplemental Agreement extended this date to February 28, 1970, unless sooner terminated after September 30, 1950 if less than 500,000 trust shares are outstanding. (Appendix pp. 97-98.)

On June 22, 1938 the Securities and Exchange Commission filed its Complaint in the United States District Court for the Eastern District of Pennsylvania against Capital and Independence alleging violations of the Securities Act and praying that certain alleged selling practices be enjoined. These two companies filed an answer denying the alleged violations of the Act, admitting jurisdiction and a proper cause of action, and consenting to a restraining decree which was entered on June 23, 1938. At the time Independence had pending before the Commission registration statements for Independence Trust Shares and for revised plans contemplating the purchase of Independence Trust Shares known as Independence Trust Shares Purchase Plans. Soon after the decree was entered the Commission permitted these registration statements to become effective.

On December 31, 1938 Independence and Capital were merged to form Independence Shares Corporation, one of the Respondents in Appeal No. 17.

The Complaint in these proceedings which contained paragraph after paragraph taken from the complaint filed by the Commission, was filed on March 11, 1939 and was followed on March 15, 1939 by a motion for the appointment of a receiver. There were nine original Complainants of whom eight were citizens of the Commonwealth of Pennsylvania. These nine Complainants represented an infinitesimal proportion of the many thousands of holders of Capital Contract Certificates. No one of the original Complainants asserted a claim exceeding $3,000, exclusive of interests and costs. The testimony developed that $820 was the largest claim of any of the original Complainants and that the aggregate of all of the claims of the nine original Complainants was $2,925, without giving any credit for the value of their trust shares. (Record pp. 274-276.) The remaining defendants are Independence, certain of its officers and directors and The Pennsylvania Company, all citizens of the Commonwealth of Pennsylvania.

The Complaint after alleging violations of the Securities Act on the part of Independence and its predecessor, Capital, went on to recite the proceedings taken by the Commission, the adverse effect of these proceedings on the business of Independence, a large "contingent" liability shown by Independence in its prospectus, and the dissipation of the assets of Independence. The Complaint did not allege any dissipation of the trust assets, nor did it charge that The Pennsylvania Company has been guilty of any misconduct, negligence or mismanagement, or that it had participated in the sale of the Contract Certificates. The Complaint prayed not only for the appointment of a receiver for Independence, for its dissolution and the distribution of its assets, but also for an order directing such receiver to take

possession of the trust assets in the hands of The Pennsylvania Company, to wind up the trusts and to make distribution.

The case, therefore, had two aspects, an attempt to put Independence out of business through the appointment of a receiver, its dissolution and the distribution of its assets, which was the concern of Independence, its officers, directors and counsel, and the attempt to authorize the receiver of Independence to take possession of the trust assets, to break the trusts and make distribution, which was the concern of The Pennsylvania Company and the 18,000 beneficiaries which it represented, including the 1400 holders of Independence Trust Shares who had no concern whatsoever with Capital or its Contract Certificates. The Pennsylvania Company, therefore, filed a motion to dismiss on March 23, 1939, challenging the jurisdiction of the District Court for lack of diversity of citizenship and required amount involved, and for failure to state a proper cause of action. Independence Shares Corporation, and its defendant officers and directors filed a like motion on March 25, 1939.

In the meantime hearings upon the Complainants' motion for the appointment of a receiver were had before the District Court and during these hearings it was testified that Independence pursuant to the Independence Trust Agreement, had in February 1939, upon advice of investment counsel, eliminated the stocks of seven of the companies in the portfolio. Pursuant to the Independence Trust Agreement, the proceeds of these stocks, which The Pennsylvania Company had sold, were distributable on April 1, 1939. Pursuant to the Capital Trust Agreement (Section 3, Appendix p. 6) The Pennsylvania Company was required to purchase additional trust shares with the dis-

tributions it received on the trust shares held for Capital Contract Certificateholders. The Complainants moved the District Court to restrain the reinvestment, but the District Court determined that it could not enter any such restraining order unless the Complainants entered a very large bond to protect against any loss which might result from an increase in the value of the trust shares through a rise in market prices. The matter was resolved for the time being by an agreement on the part of counsel for Independence that The Pennsylvania Company should hold, pending the decision of the District Court upon the motions to dismiss and upon the motion to appoint a receiver, a profit of $38,258.85 which the Independence would realize on the reinvestment.

After further hearings the District Court on May 18, 1939 filed its opinion denying the motions to dismiss and appointing a Special Master to determine the solvency of Independence. Although not one of the Complainants appeared and testified that he had been defrauded, the District Court found that the allegations of fraud had been sustained by the record.

On May 20, 1939 the Complainants submitted to the District Court preliminary injunctions which would have put Independence out of business and entirely restrained the administration of both trusts by The Pennsylvania Company. (Record p. 314.) At the hearing thereon Judge Kalodner stated that he would not at that stage of the proceedings enter any such broad and sweeping injunctions. (Record p. 315.) Counsel for Independence, however, informed the Court that his client was unwilling that the fund of $38,258.85 should remain in the hands of The Pennsylvania Company (Record p. 310), and the District Court,

on June 2, 1939, entered its order restraining The Pennsylvania Company from paying and Independence from receiving this fund. (Record p. 368.)

Inasmuch as the attempt to seize the trust assets through a receiver was of vital importance to the many thousands of beneficiaries represented by The Pennsylvania Company, and the District Court had denied The Pennsylvania Company's motions for dismissal, The Pennsylvania Company filed its notice of appeal to the United States Circuit Court for the Third Circuit on June 8, 1939. Independence and its defendant officers and directors also filed a prompt appeal. The case was advanced for argument and was argued on August 7, 1939, before Circuit Court Judges Biggs, Clark and Jones. Counsel for the Complainants was permitted to supplement his argument before that Court on August 9, 1939. The opinion of Judge Biggs was filed on November 11, 1939, disposing of both appeals.

Judge Biggs pointed out that since the Complainants, with one exception, were citizens of Pennsylvania, and all of the Defendants were citizens of Pennsylvania, the jurisdiction of the court below could not be sustained upon diversity of citizenship. He also pointed out that the claims of the Complainants could not be aggregated and that the amount in controversy did not exceed the sum of $3,000 since none of the Complainants claimed more than $2,000. (Record p. 382.)

As far as The Pennsylvania Company was concerned he found that it was not a proper party to the suit because the Complainants "have stated no cause of action against it and indeed have alleged no breach of duty on its part cognizable under the Securities Act or otherwise". (Record pp. 383-384.) He, therefore, held that the injunction against The Pennsylvania Company might not be maintained.

As far as Independence was concerned he held that the Securities Act did not enlarge the right of the Complainants for the appointment of a receiver for a corporation on the ground that it was insolvent or that its assets were being dissipated, and held that the law in this respect remained as it was, citing *Pusey & Jones v. Hanssen*, 261 U. S. 491 (1923), and the authorities there cited. He concluded that none of the prayers of the Bill of Complaint asking for specific relief might be granted. (Record p. 384.)

He did hold, however, that the Complaint alleged a cause of action under the Securities Act against Independence for the recovery in a civil action of the considerations paid by the Complainants, and that under the Federal Rules of Civil Procedure the Complaint could be treated as amended for the purposes of trial. He disposed of the argument of Independence that Complainants had no right to maintain a class action by concluding that the suit at bar was of the type denominated as a "spurious" class suit, which could be maintained under the Federal Rules of Civil Procedure and under which the individual Complainants might recover separate judgments in different amounts.

The Complainants filed a motion for a reargument which was denied on December 20, 1939. Complainants, thereupon, appealed to this Court and a certiorari was granted on March 25, 1940.

## ARGUMENT.

At the outset of our argument we wish to make our position clear in view of certain statements contained in the Complainants' brief.

Since the questions which were before the Circuit Court of Appeals and are now before this Court, relate to jurisdiction and the allegation in the Complaint of a proper cause of action, the averments of misrepresentations in the sale of securities must, for the purpose of argument and for the time being, be accepted as true. The answer filed by Independence and its officers and directors deny these averments (Record pp. 55-61). There has been no trial upon the issues framed by the Complaint and answers, and none of the Complainants have yet testified that they were defrauded.

We have at no time admitted that either the Capital Contract Certificates or the Trust Agreements were fraudulent per se. There was no such allegation in the Complaint and this argument was not advanced by the Complainants until they filed their brief in the Circuit Court of Appeals.

There was no allegation in the Complaint that the trust assets were being dissipated.

The District Court in its opinion (Record p. 351) found that there was no charge that The Pennsylvania Company had been guilty of any misconduct, neglect or mismanagement and no testimony thereof. At a subsequent hearing the District Court stated that it was its understanding that there was never a contention made by the Complainants that there was any criticizable conduct on the part of The Pennsylvania Company and that he had tried to make this clear in his opinion (Record p. 316).

## I. The District Court Had No Jurisdiction Under the Securities Act or Under the Judicial Code to Appoint a Receiver for the Securities Held by The Pennsylvania Company.

The Complaint alleges that Independence and its predecessor, Capital, in the sale of saving plan contract certificates and trust shares, by the use and means of instruments of transportation or communication in interstate commerce, and by the use of the mails, directly or indirectly, have defrauded and are defrauding the Complainants and other subscribers of both money and property by means of untrue statements, misrepresentations and concealments, and omission to state material facts necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (paragraph 33, Record p. 13), and goes on, in considerable detail, to state the misrepresentations alleged to have been made. The Complaint also alleges upon advice of counsel that under the Securities Act, Independence is liable to the subscribers for all money paid in, together with interest thereon, on contract certificates sold or issued in the three years last past (paragraph 40, Record pp. 22-23).

There is no allegation that The Pennsylvania Company participated in the sale of the savings plan contract certificates or trust shares. There is no claim that The Pennsylvania Company is liable to the subscribers under the Securities Act.

The District Court found in its opinion (Record p. 351) that "there is no charge here that The Pennsylvania Company has been guilty of any misconduct, neglect or mismanagement, and no testimony thereof.", and at a hearing held

subsequent to the filing of its opinion made the following statement which appears in the Record at page 316:

> "As I understand it, there was never a contention made by the plaintiffs that there was on the part of the Pennsylvania Company any criticizable conduct. I tried to make that as clear as my language would permit, in my opinion, that there was nothing criticizable in the conduct of the Pennsylvania Company. There was no complaint made of the Pennsylvania Company."

Complainants in this appeal contend that there are three separate bases of jurisdiction: Section 24 (1) (a) of the Judicial Code; Section 24 (8) of the Judicial Code; and Sections 12 (2) and 22 (a) of the Securities Act.

## THERE IS NO JURISDICTION OF THE PENNSYLVANIA COMPANY UNDER SECTIONS 12 (2) AND 22 (a) OF THE SECURITIES ACT.

Section 12 (2) of the Securities Act imposes upon any fraudulent seller of a security by the use or means of instruments of transportation or communication in interstate commerce or of the mails, a liability to any person purchasing such security from him, who may sue "either at law or in equity" in any court of competent jurisdiction to recover the consideration paid with interest thereon, less income received, upon tender of the security or for damages if he no longer owns the security. Section 22 (a) provides that the District Courts of the United States shall have jurisdiction, concurrent with State and Territorial courts, of all suits in equity or actions at law brought to enforce any liability or duty created by the Act.

In holding that The Pennsylvania Company was not a proper party to the suit the Circuit Court in its opinion

states (Record p. 384): "The appellees have stated no cause of action against it and indeed have alleged no breach of duty on its part cognizable under the Securities Act or otherwise.". We fail to see how the Circuit Court could have reached any other conclusion. The jurisdiction of the proceedings as far as The Pennsylvania Company is concerned cannot be based upon the Securities Act.

*Monarch Anthracite Mining Co. v. Coffin*, 102 F. (2d) 337 (C. C. A. 3d, 1939), is in point. In that case a corporation known as the Scranton Coal Co. had filed a petition under Section 77B of the Bankruptcy Act and the District Court, therefore, had jurisdiction of the corporation. Creditors of the corporation filed a class bill in the same court seeking a receiver of Monarch Anthracite Mining Company to which a mine owned by the Scranton Coal Company had been leased. Upon appeal the Circuit Court held that there was no power to appoint such a receiver without Monarch's consent (citing *Pusey & Jones Co. v. Hanssen*, 261 U. S. 491), and that the court below wac not justified in appointing a receiver for Monarch or for any mine leased or operated by it, because Monarch was solvent and able to meet any liability decreed against it, and no waste or improper operation of the mine had been proved or charged. In our case the Circuit Court has decided that the District Court had jurisdiction of Independence, but there is no question about the solvency of the trusts, because they nave no debts. There is no charge of improper administration on the part of The Pennsylvania Company, as Trustee, and by the very terms of the trusts any beneficiary may receive his trust assets or the liquidating value thereof upon demand without resort to a court of equity.

## THERE IS NO JURISDICTION OF THE PENNSYLVANIA COMPANY UNDER SECTION 24 (8) OF THE JUDICIAL CODE

This Section of the Judicial Code grants to the District Courts jurisdiction "of all suits and proceedings arising under any law regulating commerce.". Since the only law regulating commerce involved is the Securities Act, since the Complaint does not allege any violation of the Act by The Pennsylvania Company, and since the District and Circuit Courts have both found that The Pennsylvania Company has not violated any law regulating commerce, or in fact any other law, there is no jurisdiction under this Section of the Judicial Code.

## THERE IS NO JURISDICTION OF THE PENNSYLVANIA COMPANY UNDER SECTION 24 (1) (a) OF THE JUDICIAL CODE.

This Section grants to the United States District Courts jurisdiction of civil suits at common law or in equity where the matter in controversy, exceeds, exclusive of interests and costs, the sum or value of $3,000 and (a) arises under the Constitution or laws of the United States.

Here again, since The Pennsylvania Company has not violated any federal law, there is no jurisdiction and we have the added fact that the amount in controversy in accordance with the decisions of this Court, does not exceed the sum or value of $3,000 exclusive of interests and costs.

It is well settled that the claims of a number of Complainants cannot be aggregated: *Pinel v. Pinel,* 240 U. S. 594 (1916); *Lion Bonding & Surety Co. v. Karatz,* 262 U. S. 77 (1923), and as the Circuit Court had found in its opinion, no one of the original Complainants claimed more than

$2,000. (Record p. 382.) In fact it was shown by the testimony that the largest claim of any of the original Complainants was $820 and the aggregate of all claims $2,925. (Record pp. 274-276.)

Adding additional Complainants asserting claims of $3,000 and over (Record p. 366) could not give the District Court jurisdiction which it did not have in the first instance: *Pianta v. H. M. Reich Co.*, 77 F. (2d) 888 (C. C. A. 2d, 1935).

The only other possible basis for jurisdiction would have been under Section 24 (1) (b) of the Judicial Code which requires diversity of citizenship in addition to the required amount involved. Since the Complainants with one exception are citizens of Pennsylvania and all the remaining Defendants are citizens of Pennsylvania, the Circuit Court found in its opinion that Jurisdiction could not be sustained upon diversity of citizenship (Record p. 382), *Lee v. Lehigh Valley Coal Company*, 267 U. S. 542 (1925); *Salem Trust Co. v. Manufacturers Finance Co.*, 264 U. S. 182 (1924). The Complainants do not argue the point of diversity of citizenship in their brief. We may assume that they have concluded that the Circuit Court was correct and that the jurisdiction of the District Court could not be sustained upon any such basis.

The Circuit Court was, therefore, correct in holding that The Pennsylvania Company was not a proper party to the proceedings.

## II. The Securities Act Does Not Grant to the United States District Courts New and Broad Powers to Appoint Receivers.

Complainants argue that since Section 12 (2) of the Securities Act grants to any defrauded purchaser of secu-

rities the right to sue a defrauding seller of securities in equity, and since Section 22 (a) of the Act confers upon the District Courts of the United States jurisdiction of all suits in equity to enforce any liability or duty created by the Act, it was intended that a United States District Court should have the new and broad power to appoint receivers, not only of the corporation seller, but of the securities sold by the seller in the hands of a third party acting as trustee for the purchasers. That Congress had no such intention is disclosed by an analysis of the Act.

Prior to the enactment of the Securities Act, the law of this Court with respect to the appointment of receivers was well settled. Simple contract creditors have no equitable lien on the assets of a corporation, and they have no right to a receiver unless they have reduced their claims to judgment and can show that execution is likely to be fruitless: *Hollins v. Brierfield Coal & Iron Company,* 150 U. S. 371 (1893). A receivership of a corporation is not an end in itself. A United States District Court has no power to appoint a receiver for a corporation on the ground of insolvency at the instance of a simple contract creditor in the absence of a consenting answer by the corporation, even though a statute of the State in which the District Court is sitting authorizes the appointment of a receiver upon such grounds. *Pusey & Jones Co. v. Hanssen,* 261 U. S. 491 (1923). A receiver will not be appointed for a trust where the only end of the receivership is to supplant a trustee who is not charged with mismanagement and where a receivership will result in unnecessary expense. *Gordon v. Washington,* 295 U. S. 30 (1935).

It is not argued that the appointment of receivers by District Courts depends upon specific federal statutes. Equitable jurisdiction of suits of a civil nature is granted

to the District Courts by Section 24 (1) of the Judicial Code. The jurisdiction thus conferred is an authority to administer in equity suits the principles of a system of judicial remedies which had been devised and was being administered by the English Courts of Chancellery at the time of the separation of the two countries. *Atlas Insurance Co. v. Southern, Inc.*, 306 U. S. 563, 568 (1939). This Section of the Judicial Code does not define the jurisdiction of the District Courts. It merely prescribes the body of the doctrine which is to guide their decisions and enable them to determine in any given instance whether a suit of which a District Court has jurisdiction as a federal court is an appropriate one for the exercise of the extraordinary powers of a court of equity: *Atlas Insurance Company v. Southern, Inc., supra.* Mere prima facie jurisdiction under Section 24 (1) of the Judicial Code on the basis of diversity of citizenship and the required amount involved does not in itself confer the power to appoint a receiver. The District Court must also determine whether, in accordance with the accepted principles of equity, any state of facts is presented which calls for the exercise of its extraordinary power as a court in equity. *Gordon v. Washington, supra.*

There is no mention of the appointment of a receiver in any of the provisions of the Securities Act, which was passed by Congress for the purpose of requiring truth in the sale of securities. It has three general divisions: criminal responsibility and its enforcement; regulation by the Commission with power of investigation and injunction; and civil liability of the seller with the right of the aggrieved purchasers to bring suit to recover the purchase prices or damages.

The Commission is granted the right to enjoin frauds upon the investing public in the sale of securities as well as

powers designed to prevent such frauds. Under Section 8 (b) the Commission may refuse to permit a registration to become effective. It may issue stop orders under Section 8 (d) and conduct investigation under Section 8 (e). It has the power to make and rescind rules and regulations under Section 19 (a), and its members and officers have the power in all investigations to administer oaths, subpœna witnesses, take evidence, and require the production of any books, papers and documents deemed relevant by the Commission. Lastly, and important for the purposes of our case, the Commission has the power under Section 20 to institute proceedings for injunctive relief to prevent violations of the Act and to apply for writs of mandamus to compel compliance with the Act. No injunctive remedies are granted by the Act to aggrieved purchasers. Their only remedy is to bring suits under Section 12 for the recovery of the purchase price paid if they have disposed of their securities, or for damages if they still hold them.

Administrative law has been greatly expanded in this country in recent times. Many commissions have been created by Acts of Congress having broad powers over matters of vital national concern. The Commission created by the Securities Act performs an important and necessary function in regulating the sale of securities in interstate commerce and through the mails, and it is plain that Congress intended that the Commission was to have and exercise the power to prevent and enjoin frauds.

In the case at bar the Commission made its investigation of the selling activities of Capital and Independence and pursuant to the powers granted to it under the Act brought proceedings it deemed necessary and obtained injunctive relief. It is indicative that after the decree had

been entered enjoining sales practices which both Capital and Independence at the time denied, registration statements filed with the Commission for Independence Trust Shares and for Independence Trust Shares Purchase Plans were permitted to become effective.

Even the most ardent advocates of the expansion of administrative law and of the vesting in commissions of broad power of regulation, would not suggest that each and every individual citizen should also be invested with the power of appealing to the courts for the purpose of having the courts exercise powers granted to these commissions. In the case of the Securities Act, Congress plainly intended that the courts were to have the power of granting injunctive relief only at the instance of the Commission for the purpose of preventing security frauds upon the public in general. The defrauded purchasers were intended only to have the right to bring suits to redress the wrong done to them individually.

### III. The District Court in This Case Should Not in Any Event, Appoint a Receiver of the Trust Assets and Decree a Dissolution of the Trusts.

As we have pointed out above, the District Court had no jurisdiction of The Pennsylvania Company because it had violated no federal law and because diversity of citizenship and required amount involved were lacking. While we might have confined our argument to matters relating only to jurisdiction, we feel it incumbent upon us to point out to this Court the many reasons why a court in equity should not grant the relief prayed for against The Pennsylvania Company and the trust assets in its hands.

The leading case in this Court upon the subject of the appointment of a receiver for a trust fund is *Gordon v.*

*Washington*, 295 U. S. 30 (1935). In that case, diversity of citizenship and required amount involved were present and the United States District Court for the Eastern District of Pennsylvania had prima facie jurisdiction under Section 24 (1) (b) of the Judicial Code. It appointed a receiver for mortgage pools which had been held in trust by a bank. The bank had failed and the Pennsylvania Secretary of Banking had taken possession under the Pennsylvania Banking Code. As an incident of this possession, the Secretary of Banking took possession of the mortgage pools. The District Court found that nothing had been done by the banking department to provide the means for an active, intelligent and responsible administration of the mortgage pools, and on this ground it appointed a receiver. The Circuit Court of Appeals on the basis of this finding determined that there had been no abuse of discretion and the Secretary of Banking appealed to this Court. This Court reversed the decrees below and remanded the cause with directions to the District Court to dismiss the bills and discharge the receivers.

This Court in its opinion pointed out that where the defendant challenges the sufficiency of a complaint and the appropriateness of the appointment of receivers, it was not enough for the District Court to decide that as a federal court it had power to act, and that it should also determine whether, in accordance with accepted principles of equity, any state of facts was presented to it which called for the exercise of its extraordinary powers as a court of equity. We take the following from the opinion of this Court at page 36:

> "Since the court had power to act, it is necessary to consider the various objections urged to the decree only insofar as they are addressed to the propriety of

its action as a court of equity. These objections were not foreclosed by the determination that the court had jurisdiction. By the Judiciary Act of 1789, c. 20, § 11, 1 Stat. 73, 78; U. S. C. Tit. 28, § 41 (1), the lower federal courts were given original jurisdiction "of suits . . . in equity," where the other jurisdictional requisites are satisfied. From the beginning, the phrase "suits in equity" has been understood to refer to suits in which relief is sought according to the principles applied by the English court of chancery before 1789, as they have been developed in the federal courts. Robinson v. Campbell, 3 Wheat. 212, 221-223; United States v. Howland, 4 Wheat. 108, 115; Waterman v. Canal-Louisiana Bank & Trust Co., 215 U. S. 33, 43. When the petitioners challenged the sufficiency of the bills of complaint and the appropriateness of the appointment of receivers, it was not enough for the district court to decide that as a federal court it had power to act. It should also have determined whether, in accordance with the accepted principles of equity, any state of facts was presented to it which called for the exercise of its extraordinary powers as a court of equity."

This court pointed out that the sole relief prayed for by the complaints was the appointment of receivers and the command of the court that property shown to be in the lawful possession of the Secretary of Banking, be surrendered to them. It held that a receivership is only a means to reach some legitimate end sought through the exercise of the power of a court of equity and that it was not an end in itself; that there was no occasion for a court of equity to appoint a receiver of property of which it is asked to make no further disposition, and that even when a bill of complaint states a cause of action in equity, the summary remedy by receivership, with the attendant burdensome expense, should be resorted to only on a plain showing of some

threatened loss or injury to the property, which the receivership would avoid. It held that the finding of the District Court that nothing had been done by the department of banking to provide the means for an active, intelligent and responsible administration of the mortgage pools was without support in the record, and reversed the decrees below and directed the District Court to dismiss the bills and discharge the receivers.

Since the principles of law laid down by this Court in *Gordon v. Washington* are of utmost importance in the case at bar, we quote the balance of this Court's opinion commencing at page 36:—

> "The sole relief prayed by the bills was the appointment of receivers and the command of the court that property, shown to be in the lawful possession of the petitioner acting as a temporary trustee or fiduciary, be surrendered to them. A receivership is only a means to reach some legitimate end sought through the exercise of the power of a court of equity. It is not an end in itself. Where a final decree involving the disposition of property is appropriately asked, the court in its discretion may appoint a receiver to preserve and protect the property pending its final disposition. For that purpose, the court may appoint a receiver of mortgaged property to protect and conserve it pending foreclosure, Wallace v. Loomis, 97 U. S. 146, 162; Union Trust Co. v. Illinois Midland Ry. Co., 117 U. S. 434, 455; Hitz v. Jenks, 123 U. S. 297, 306; Freedman's Saving & Trust Co. v. Shepherd, 127 U. S. 494, 500-504; Shepherd v. Pepper, 133 U. S. 626, 652, of trust property pending the appointment of a new trustee, Underground Electric Rys. Co. v. Owsley, 176 Fed. 26 (C. C. A. 2d); Ball v. Tompkins, 41 Fed. 486, 489 (C. C.); cf. Haines v. Carpenter, 1 Woods 262, aff'd 91 U. S. 254, or of property which a judgment

creditor seeks to have applied to the satisfaction of his judgment, Covington Drawbridge Co. v. Shepherd, 21 How. 112, 125; Ogilvie v. Knox Insurance Co., 22 How. 380, 392; Ingle v. Jones, 9 Wall. 486, 498.

"But there is no occasion for a court of equity to appoint a receiver of property of which it is asked to make no further disposition. The English chancery court from the beginning declined to exercise its jurisdiction for that purpose. Anonymous, 1 Atkyns 489, 578; Ex parte Whitfield, 2 Atkyns 315; Goodman v. Whitcomb, 1 Jacob & Walker 589, 592; Robinson v. Hadley, 11 Beavan 614; Roberts v. Eberhardt, Kay 148, 160, 161. It is true that the receivership of an insolvent corporation, upon the application of a simple contract creditor with the consent of the corporation, has been recognized by the federal courts as an appropriate form of relief when the end sought is the liquidation of the assets and their equitable distribution among the creditors. Brown v. Lake Superior Iron Co., 134 U. S. 530; Re Metropolitan Railway Receivership, 208 U. S. 90, 109, 110; Pusey & Jones Co. v. Hanssen, 261 U. S. 491, 500, 501; United States v. Butterworth-Judson Corp., 269 U. S. 504, 513, 514; compare Harkin v. Brundage, 276 U. S. 36, 52; Michigan v. Michigan Trust Co., 286 U. S. 334, 345; Shapiro v. Wilgus, 287 U. S. 348, 356; National Surety Co. v. Coriell, 289 U. S. 426, 436; First National Bank v. Flershem, 290 U. S. 504, 525. Whether this exercise of jurisdiction, to liquidate or conserve the assets of a corporation through the agency of a receivership, is to be supported as an extension of that exercised over decedent's estates, see Glenn on Liquidation, §§ 154-161, or of remedies afforded to judgment creditors where legal remedies are inadequate, see Manhattan Rubber Mfg. Co. v. Lucey Mfg. Co., 5 F. (2d) 39, 42 (C. C. A. 2nd), it has never been extended to other classes of cases. Whenever the attempt thus to extend it, by

using the receivership as an end instead of a means, has been brought to the attention of this Court, it has pointed out that a federal court of equity will not appoint a receiver where the appointment is not ancillary to some form of final relief which is appropriate for equity to give. Pusey & Jones Co. v. Hanssen, supra, 497; Booth v. Clark, 17 How. 322, 331; see Lion Bonding & Surety Co. v. Karatz, 262 U. S. 77; Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371.

"Respondents' bills of complaint not only failed to seek any remedy other than the appointment of receivers, but they failed to disclose any basis for equitable relief by the appointment of receivers or otherwise. Respondents are not shown to be creditors, much less judgment creditors. As beneficiaries of the fiduciary relationship of the trust company, and later of the Secretary, to the mortgage pools, they failed to allege misconduct or neglect on which any equitable relief could be predicated. They did not show that there was any danger to the assets of the mortgage pools, or to their management, which would be avoided or removed by the appointment of receivers. Petitioner did not waive these defects of the bills, or consent to the appointment of receivers.

"We have recently had occasion to point out that a federal court, even in the exercise of an equity jurisdiction not otherwise inappropriate, should not appoint a receiver to displace the possession of a state officer lawfully administering property for the benefit of interested parties, except where it appears that the procedure afforded by state law is inadequate or that it will not be diligently and honestly followed. Gordon v. Ominsky, supra; Pennsylvania v. Williams, supra. Even when the bill of complaint states a cause of action in equity, the summary remedy by receivership, with the attendant burdensome expense, should be resorted to only on a plain showing of some threatened

loss or injury to the property, which the receivership would avoid. Here no such showing was made. It is true the district court found that nothing had been done by the Banking Department to provide the means for an active, intelligent and responsible administration of the mortgage pools. The Court of Appeals, on the basis of this finding, thought there had been no abuse of discretion. But that finding is without support in the record.

"The court below erred in not directing dismissal of the bills of complaint as failing to state a cause of action in equity. The appointment of receivers, in the circumstances, was an abuse of discretion which should have been promptly set aside on the applications of the petitioner. The decrees below will be reversed and the cause remanded with directions to the district court to dismiss the bills and discharge the receivers."

*Home Mortgage Company v. Ramsey*, 49 F. (2d) 738 (C. C. A. 4th, 1931), decided by the Circuit Court of Appeals, Fourth Circuit, is also directly in point. In that case the corporation had issued more than $10,000,000. of its bonds under five trust indentures of which First National Bank of Durham, N. C., was trustee, and had pledged as collateral therefor notes and mortgages of individual borrowers. The plaintiff owned $3,500. of one of the series of bonds and filed her complaint alleging insolvency and mismanagement of the corporation and praying for the appointment of a receiver of the corporation and of the trust assets. The District Court appointed receivers of the corporation and continued the trustee in its duties as trustee in connection with the receivers. The Circuit Court of Appeals reversed the District Court and remanded the case with directions to vacate the receivership, order the property of the defendants returned to them forthwith and to

dismiss the suit. We take the following from the opinion at pages 742-743:

> "In effect, it is nothing more than a bill to take charge of a trust estate because of misconduct or incompetency of the trustee, or such mismanagement as would amount to waste. Here the proofs are lacking to show any misconduct or mismanagement on the part of the trustee, and both the special master and the district court have found there was none. The District Court has not attempted to remove the trustee, but, on the contrary, has continued the trustee in its duties as trustee in connection with the receivers. Consequently, this is not a case where the trust is being abused, and the court of equity is removing the trustee and directing the administration of the trust. If it were, a receivership of the trust estate pendente lite would be proper and a receivership of the other property of the corporation might be proper as incidental relief, but certainly it is not proper where the trust is to be administered by the trustee, and the only effect of the receivership would be to create charges against the funds in the hands of the trustee."

## NO FACTS WERE ALLEGED OR PROVEN JUSTIFYING THE REMOVAL OF THE PENNSYLVANIA COMPANY AS TRUSTEE.

As we have pointed out above, the District Court found in its opinion that it had been not charged in the Complaint or shown by the testimony that The Pennsylvania Company had been guilty of misconduct, neglect or mismanagement and at a subsequent hearing stated that there had been no criticism of The Pennsylvania Company. The Pennsylvania Company is a responsible and well established trust company, and its functions and duties as trustee under the trust agreements although ministerial in nature are explicit, and are being carried out by it faith-

fully. The case at bar is entirely different from such cases as *Cook v. Flagg*, 233 F. 426 (C. C. A. 2d, 1916), cited by the Complainants in their brief, where the defendant, Flagg, a stock broker in possession of his clients' securities, had been convicted of using the mails to defraud.

The District Court in its opinion attempted to distinguish *Gordon v. Washington, supra,* on the theory that in that case the Pennsylvania Secretary of Banking was responsible to the State Court in which he had filed his certificate of possession pursuant to Pennsylvania law. Reference to the language of this Court in *Gordon v. Washington* quoted above shows that this point was but an incidental factor in its decision. The distinction drawn by the District Court is, therefore, without merit.

## NO FACTS WERE ALLEGED OR PROVEN SHOWING WASTE OR DISSIPATION OF TRUST ASSETS.

The Bill of Complaint did not allege that the trust assets were being or would be wasted or dissipated. It alleged that the assets of Independence were being or would be dissipated. It averred in paragraph 46 (Record p. 25) that as a result of the adverse, detrimental and injurious publicity occasioned by the proceedings of the Securities Commision, the funds, assets and property of Independence would be dissipated, depleted and wasted. The Complainants contend in their brief that the sale of the seven underlying stocks in the Independence trust was a dissipation of the trust assets. This is not the fact. These seven stocks were eliminated from the portfolio under the power granted to Independence under Independence Trust Agreement to eliminate the stocks which had become or were likely to become impaired in value. It was, therefore, definitely contemplated by the terms of the

trust that it might become necessary to eliminate stocks at depressed prices. The elimination of stocks at a loss was obviously contemplated. The District Court found that there had been no abuse of discretion on the part of investment counsel or of Independence in this elimination (Record p. 361), so that there could be no dissipation in the sense that the sales were wrongful or improper.

Independence did not receive any of the proceeds of sale except to the extent that it may have been the registered holder of Independence Trust Shares as of the last distribution date. There was no diversion of proceeds of sale to persons not entitled to receive their pro rata share. On April 1, 1938 The Pennsylvania Company as Trustee of the Independence Trust distributed to The Pennsylvania Company, as Trustee of the Capital Trust, the proportion of the proceeds of the sale applicable to the trust shares held for the holders of the Capital Trust Certificates. This money was invested in additional trust shares in accordance with the Contract Certificates and the Capital Trust Agreement, excepting that there was deducted and held in the hands of the Trustee the amount of money which represented the mark up which Independence was entitled to receive under the terms of the Capital Trust Agreement.

The case at bar is entirely different from such cases as *Merchants' National Bank v. Chattanooga Construction Company*, 53 F. 314 (C. C. E. D. Tenn., 1892), cited by the Complainants in their brief, where the officers of the defendant corporation were conspiring to strip it of its assets and were pledging bonds owned by it for debts of others.

## EACH BENEFICIARY MAY AT ANY TIME RECEIVE HIS TRUST PROPERTY OR THE LIQUIDATING VALUE THEREOF.

The Complaint admits that each Capital Contract Certificateholder may at any time demand and receive from The Pennsylvania Company his Independence Trust Shares or the liquidating value thereof. (Record p. 11.) This right is specifically provided for in the Capital Trust Agreement. (Section 5, Appendix p. 8.) If he elects to receive his trust shares he may either hold them as an investment, sell them, or exercise his rights of withdrawal under the Independence Trust Agreement. (Sections II, III, IV, V and VI, Appendix, pp. 61-63.) The Complaint also admits, which is the fact, that The Pennsylvania Company keeps an account for each Capital Contract Certificateholder showing the exact amount of Independence Trust Shares and fractions held for him at any one time. (Record p. 11.)

As this Court held in *Gordon v. Washington, supra,* a receivership is not an end in itself. It is only a means to reach some legitimate end sought through the exercise of the power of a court of equity. There is no occasion for the appointment of a receiver of the trust under the theory of such cases as *Case v. Beauregard,* 101 U. S. 688 (1879), where it was held that a court in equity had the power to impress a trust on a fund in the hands of an unwilling trustee. The existence of the trusts are admitted and the terms of the trusts are in writing. There is no necessity for the intervention of a court in equity under the theory of such cases as *Oelrichs v. Spain,* 82 U. S. 211 (1872), which was a proceedings in equity to determine the respective rights of claimants against a trust fund. In our case the rights of the beneficiaries in the trust funds are fixed and determined,

and no court proceedings are necessary to determine their respective rights. Finally, there is no necessity for a court in equity to set aside the trusts for fraud or for any other reason, because it is admitted the Trustee will, at any time, permit any beneficiary to revoke the trust as to himself and will deliver his trust property or the liquidating value thereof on demand. The cases cited by the Complainants relate to adverse proceedings by a defrauded grantor against a trustee contending the trust is irrevocable.

The contention of the Complainants that the trusts are fraudulent per se is without any basis. They certainly do not seriously contend that the Independence Trust, which creates a fixed investment trust in the accepted form is fraudulent. Neither is there anything inherently fraudulent in the Capital Trust. The charges may be heavy, but it cannot be said that they are fraudulent if they are fully disclosed to prospective Contract Certificateholders, as required by the Securities Act, at the time of sale. The fraud alleged is in sales methods, but this does not result in the Capital Contract Certificates or the trusts being fraudulent per se.

## THE TERMINATION OF THE TRUSTS WOULD CONSTITUTE A BREACH OF THE TERMS OF THE TRUSTS.

The Complaint prays not only that the receiver to be appointed for Independence take over the trust assets but also that the trusts be dissolved and the trust assets distributed. The Independence Trust Agreement originally provided that The Pennsylvania Company was to hold the trust assets until 1950, subject only to the exercise of the

right of withdrawal, and by the Third Supplemental Agreement the termination of the trust is extended to 1970. A termination of the Independence trust by the court through a receiver would, therefore, be a direct violation of the very terms of this trust agreement.

Under the Capital Trust Agreement neither The Pennsylvania Company, as Trustee, nor Independence has the right to terminate any Contract Certificate unless the Contract Certificateholder is in default in the payment of his monthly payments for a period of six months. (Section 6, Appendix pp. 8-9.) Furthermore, after a Contract Certificateholder has completed all of his payments, and there are a great number of such cases, he may require The Pennsylvania Company, as Trustee, to hold his trust shares for him for another ten years. (Section 4, Appendix p. 6.) The termination of the Capital Trust and the distribution of its assets would, therefore, violate the terms of the Capital Trust Agreement and the Contract Certificates.

As this Court stated in *Gordon v. Washington, supra,* a receivership is only a means to some legitimate end. The termination of the trusts contrary to their explicit terms, and the violation of the rights of the beneficiaries, far from being a legitimate end which should appeal to a court of equity, is actually an illegal and unauthorized end.

The appointment of a receiver for the trust assets would breach other important provisions of the Capital Trust Agreement. Although it is usual to provide in trust agreements and trust indentures for the resignation or removal of a corporate trustee, it will be noted that the Capital Trust Agreement is novel in this respect. The Pennsylvania Company cannot resign and cannot be removed from its trusteeship with respect to any Contract Certificate

which is at the time outstanding. (Section 1, Appendix p. 18.) The purpose of this provision was to assure the Contract Certificateholders that their trust shares would at all times be in the custody of and be administered by a responsible bank well known in the community. These novel provisions were inserted in the trust agreement after careful consideration for the protection of the Contract Certificateholders and no court of equity should disregard them and violate them in the absence of very impelling reasons. These provisions are entirely fair. The Contract Certificateholders are not wedded to The Pennsylvania Company because they can at any time withdraw and part company with their trustee. But they are entitled to have the provisions of their contract carried out and there would be no warrant to appoint a successor trustee at the instance of a mere handful of Contract Certificateholders without their consent. These proceedings have created a great deal of uneasiness among the Contract Certificateholders. The last thing that a great many of them desire is that The Pennsylvania Company should be supplanted by a receiver.

## A RECEIVER WOULD HINDER THE BENEFICIARIES IN EXERCISING THE RIGHTS GRANTED TO THEM UNDER THE TRUST AGREEMENTS.

The first effect of a receivership of the trust assets would be to prevent the holders of Contract Certificates and the holders of Independence Trust Shares from receiving their trust property or the liquidating value thereon on demand because a receiver would not be free to act without orders of court. Instead of communicating with the office of the trustee to exercise their rights, the beneficiaries of these trusts would be put to the expense of employing

counsel to file the necessary petitions and to obtain orders of the court thereon. Another result of a receivership would be that the Contract Certificateholders who desired to continue their payments would not be permitted to do so because the trust would be terminated. A further result of the receivership would be that the holders of Independence Trust Shares who had purchased them as an investment would have their property liquidated and paid to them in cash against their desires. Furthermore, if a receiver were appointed, the market for Independent Trust Shares would be non-existent, and if the market prices of the underlying stocks declined thousands of dollars might be lost.

## THE RECEIVERSHIP WOULD RESULT IN A VERY LARGE AND WHOLLY UNNECESSARY EXPENSE.

The accounting problems of any receivership would be enormous. The Pennsylvania Company is now able to administer the Capital Trust by the use of expensive accounting machines and is able to pay its clerical force from the trustee fees which are taken from the payments. If a receiver is appointed for the purpose of winding up the trusts all payments will stop and the work of the accountants and the receiver's clerks will involve a mass of small items with the resultant large expenses.

At the present time, except in the case of Contract Certificates which are fully paid, the Trustee receives nothing for services or expenses excepting out of payments which are made. Nothing is charged to a Contract Certificateholder who discontinues his payments before he had completed them, and unless and until The Pennsylvania Com-

pany or Independence terminates his Contract Certificate for default, The Pennsylvania Company holds his trust shares and reinvests his distributions without any charge whatsoever.

Not only would the ordinary expenses of administering the receivership and of making distributions entail very large expense, but on the theory of the prayers of Complaint a complete accounting and marshalling would have to be made of all claims. There is no question of marshalling claims in this case, because the trust assets belonging to one Contract Certificateholder cannot be applied to the claim of another Contract Certificateholder against Independence, but if it were ever attempted, the accounting expenses would run into thousands of dollars and consume months of work.

## THE PRINCIPAL BENEFICIARIES OF THE RECEIVERSHIP WOULD BE THE RECEIVER AND HIS COUNSEL.

Who, then, would benefit by a receivership of the trust assets? Certainly not the Contract Certificateholders because they are not charged anything for the trust administration except when they make a payment, and in that case, they pay a moderate fee at the rate of 25¢ for each $10.00 payment for the services of The Pennsylvania Company in purchasing their trust shares, keeping them in its custody, keeping of their individual accounts and reinvesting of their distributions. Furthermore, they are free to withdraw from the trust at any time and demand and receive their trust assets or the liquidating value thereof.

The principal beneficiaries of the receivership would be the receiver and his counsel. The value of the trust assets held by The Pennsylvania Company exceeds $3,000,000. The semi-annual income on the securities held in trust amounts to many thousands of dollars. It is well known that the fees of the receivers and his counsel in any receivership involving any such sums are never moderate. The accepted practice is to take the value of assets involved into account in fixing such fees and there is no reason to believe that the fees of a receiver and of his counsel in any such case as this would not amount to many thousands of dollars, all paid out of the assets belonging to the beneficiaries who the Complainants allege have already been victimized by excessive charges.

Unnecessary receiverships entailing unnecessary expenses and large fees have been justly criticized. If a receiver were appointed for the trust assets in these proceedings it would be another case justifying like criticism.

## CONCLUSION.

The District Court had no jurisdiction of The Pennsylvania Company in this case under the Judicial Code nor under the Securities Act and the Circuit Court correctly held that it was not a proper party to the proceedings. There is no legitimate end which a receivership of the trust assets would serve. The trust assets are in the hands of a responsible trustee who is carrying out its trust in accordance with the terms of the trust agreements. The trust assets belonging to Contract Certificateholders cannot be taken from them to satisfy claims of other Contract Certificateholders against Independence. The only result of a receivership would be large and unjustified expenses paid

out of the assets belonging to the Contract Certificateholders who the Complainants allege have already been victimized by excessive charges.

Respectfully submitted,

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